Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

JOSEPH DEFEDE,

Petitioner,

-vs-

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(I) Whether, as a matter of law, an alleged leader of a criminal organization must be detained prior to trial solely by virtue of his status.

(II) Whether the Court created an impermissible irrebuttable presumption of detention.

(III) Whether the Court made an improper inference based upon status.

(IV) Whether the government proffered sufficient evidence to warrant a finding that Defede is the acting head of the Luchese family.

(V) Whether live testimony based upon personal knowledge was required rather than hearsay proffers.

(VI) Whether the Court's ruling violated Defede's, substantive and procedural due process rights, the Eighth Amendment, and the Separation of Powers clause of the United States Constitution.

PARTIES

The names of all parties to the proceeding in the Court whose order is sought to be reviewed are:

Joseph Defede, Daniel Rizzo, Michael Vuolo, Oscar Ansourian, Sidney Lieberman, Irwin Schlacter, and John Murno.

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The May 2, 1998 ruling of Magistrate Andrew W. Peck of the Southern District of New York was transcribed. The June 8, 1998 decision rendered by the District Court which denied petitioner's motion to modify and/or amend the Peck decision is contained in the appendix. The June 25, 1998 affirmance of the District Court by the United States Court of Appeals for the Second Circuit is also found in the appendix. None of these decisions have been officially reported.

In The

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October Term 1998

JOSEPH DEFEDE,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI

JURISDICTION

This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3735. This petition is timely filed, within ninety (90) days entry of the Second Circuit Court of Appeal's decision.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment of the Constitution provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property without due process of law.

The Eighth Amendment of the Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATUTORY PROVISIONS

The Bail Reform Act 18 Sec. 3142 (f) Detention, in relevant part, states:

> The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of the person as required and the safety of any other person and the community —
>
> (1) upon motion of the attorney for the Government, in any case that involves —
>
> (A) a crime of violence;
>
> (B) an offense for which the maximum sentence is life imprisonment or death;
>
> (C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq.*), or section 1 of the Act of September 15, 1980 (21 U.S.C. 955a); or
>
> (D) any felony if the person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or
>
> (2) upon motion of the attorney for the Government or upon the judicial officer's own motion, in a case that involves —

(A) a serious risk that the person will flee; or

(B) a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days, and a continuance on motion of the attorney for the Government may not exceed three days. During a continuance, the person shall be detained, and the judicial officer, on motion of the attorney for the Government or sua sponte, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether such person is an addict. At the hearing, such person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear a the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing. The hearing may be reopened before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the

movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.

(g) Factors to be Considered: — The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning —

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;

(2) the weight of the evidence against the person;

(3) The history and characteristics of the person, including —

(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug of alcohol abuse, criminal history and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal or completion of sentence for an offense under Federal, State or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person release. In considering the conditions of

release described in subsection (c)(2)(K) or (c)(2)(L) of this section, the judicial officer may upon his own motion or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

(i) Contents of detention order — In a detention order issued under subsection (e) of this section, the judicial officer shall —

(1) include written findings of fact and a written statement of the reasons for the detention;

(2) direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

(3) direct that, the person be afforded reasonable opportunity for private consultation with counsel; and

(4) direct that on order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined deliver the person to a United States marshal for the purpose of an appearance in connection with a court proceeding.

The judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be

necessary for preparation of the person's defense or for another compelling reason.

(j) Presumption of innocence. — Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

STATEMENT OF THE CASE

This petition, which seeks reversal of Joseph Defede's ("Defede") detention, involves extraordinary constitutional issues of first impression. Defede's interest in his liberty — in release pending trial — is substantial and fundamental. *United States v. Salerno,* 481 U.S. 739, 751 (1987).

Petitioner Defede is charged with membership in and leadership of the Luchese organized crime family, an entity which the Southern District of New York grand jury claims engaged in a continuous RICO enterprise. Defede is charged with participating in a pattern of racketeering to extort money and property from New York's garment center businesses. The substantive counts against Defede are general extortion charges, without naming victims or detailing the manner in which the extortion occurred.

By affirming the lower court without decision, the United States Court of Appeals for the Second Circuit, by its silence, has created a new substantive rule of law which allows a criminal tribunal to detain an accused solely by virtue of his status. The lower court's holding creates a special class of defendants, organized crime leaders, for whom the 1984 Bail Reform Act (" Act") does not apply. The court has created an irrebuttable presumption which only Congress can create, and did so in violation of the Separation of Powers Clause of the United States Constitution. This is in contrast to the aphorism which cautions us against judging books by their cover.

The impact of the Second Circuit's ruling is that the Act does not apply to individuals alleged to be organized crime leaders. Evidence of past violent conduct (or its absence) is immaterial. Most critically, the government conceded that it would not have sought detention but for Defede's status. The District Court held, as a matter of law, that because of who he is, Defede is *per se* violent and therefore dangerous to society.

The government acknowledged in District Court that Defede is an appropriate bail candidate, but only if no clear and convincing proof exists that he is the acting head of an organized crime family. Because Defede has purportedly achieved leadership status, the court held that he necessarily engaged in a panoply of conduct attributed to all organized crime leaders. Based upon assumption and belief, the court exempted Defede from the statutory mandates of the Act.

On the pivotal issue — whether Defede is head of a crime family — the court refused Defede's request for either live testimony or a proffer based upon personal knowledge. The government had no direct proof to establish Defede's status — no admissions, no personal observations and no documents. In all other cases involving leaders, direct proof was available and submitted in proffer to the court on the leadership issue. *See United States v. Bellomo,* 944 F. Supp. 1160 (S.D.N.Y. 1996, Kaplan, J.), *United States v. Gotti,* 776 F.Supp. 666 (E.D.N.Y 1991), *United States v. Columbo,* 777 F.2d 96 (2d Cir. 1985), *United States v. Orena,* 986 F.2d 628 (2d Cir. 1993).

The Constitution imposes the strictest limits upon the government's ability to imprison an accused. Defede may not be imprisoned because the District Court thought him likely to engage in future violent conduct. Predicting dangerous conduct is extraordinarily difficult and often unreliable. Defede's constitutional guarantees of freedom and liberty may not be eviscerated because the government opines that a risk ought not be taken.

In analyzing the thrust of the court's decision, it appears the court believed that if Defede were released, despite stringent release conditions, he would carry on the regular business inherent in his status. The proof that Defede was acting boss of the Luchese family was founded on hearsay and inferences derived from flimsy, unrelated immaterial

evidence, rather than concrete proof based upon personal knowledge. Hearsay, assumptions, weak inferences and theory cannot form the foundation required to satisfy the "clear and convincing" threshold required to detain one believed to be dangerous. This type of analysis violates Defede's rights to procedural and substantive due process of law.[1]

The District Court's detention order did not hinge on risk of flight, intimidation or threats to potential witnesses, jurors or others in the judicial process. The court did not find that Defede was likely to tamper with witnesses or jurors, or otherwise jeopardize the legal proceedings. We do agree that when substantial evidence indicates that a defendant, if released, would commit such acts, pretrial detention may be imposed.

Pretrial detention is permitted in extremely limited circumstances, and only upon a substantial showing that a defendant poses a danger to the community or is at risk of flight before his (her) trial is commenced. 18 U.S.C. §3142; *United States v. Salerno,* 481 U.S. 739 (1987). Preventive detention must remain the exception rather than the rule. Defede is being harshly punished, when punishment only should follow a conviction upon proof beyond a reasonable doubt. *In re Winship,* 397 U.S. 358 (1970).

Under our Constitution, the prohibition against excessive bail, the Due Process Clause, and the presumption of innocence — indeed, the fundamental structure of our government — militate against the offensive practice of incarceration before a determination of

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[1]Even if Defede were previously convicted of a crime (which he was not), the probability that he would again engage in crime while released on bail would also not sanction his detention in anticipation of such future crimes. Such incarceration would violate substantive due process. *Helvering v. Mitchell,* 303 U.S. 391 (1938).

innocence or guilt. *See United States v. Montalvo-Morillo,* 495 U.S. 711 (1990).

A. STATEMENT OF FACTS

1. The May 1 Magistrate Hearing

During the initial bail hearing before the magistrate, the government proffered nine (9) reasons why Defede was not harmless.

The prosecutor claimed that Defede:

A. was labeled "acting Luchese boss" by confidential sources – who "knew" this to be true because others had told them so;

B. visited Vic Amuso ("Amuso"), alleged former head of the Luchese family, at the federal prison in Terre Haute, Indiana – visits, in and of themselves, prove nothing. The government failed to provide who Amuso's other visitors were. Defede's visits were made with the Bureau of Prison's approval which was never revoked, nor was he ever accused of improper conduct;

C. discussed criminal activity with Amuso – this claim could not be proven;

D. discussed "breaking legs" and money changing hands with Amuso – this claim could not be proven;

E. met with Oscar Ansourian ("Ansourian") in a local Queens park several years ago – knowing someone, or guilt by association, is an improper basis to establish culpability;

F. was dangerous because Ansourian was arrested for gun possession – again, guilt by association is not the law;

G. emboldened co-defendant Irwin Schlacter ("Schlacter") to make threats – a mere claim without the manner in which this occurred or the source of the proof;

H. carried a yellow envelope similar to a yellow envelope previously held by co-defendant Vuolo – no proof was offered as to the envelope's contents, or from whom it was obtained, and

I. engaged in a conspiracy to murder – a bold allegation made with no proof as to the claim's maker, the time, place or any other specifics.

Defede vigorously disputed these allegations in the briefs filed by him and by his very position vis a vis the claims.

The magistrate found Defede detainable, but articulated no detailed reasons for his decision. He failed to make written findings and examined no conditions which would have allowed Defede to remain free.

2. Defede's Bail Proposal

Defede proposed a $2 million bail package secured by nine (9) residential homes. Twenty persons were and currently are prepared as act as sureties. Defede offered to comply with all conditions suggested by the Act.

3. Pre-trial Discovery

Subsequent to this hearing, the government delivered partial discovery and other material related to its dangerousness allegation against Defede. This material included tape recorded conversations, electronic audio and video surveillance, and a host of other documents made during the course of its Defede investigation. Those portions of tapes which supposedly contained Defede/Amuso conversations pertaining to violence and criminal conduct were inaudible.

4. Bail in the District Court

Defede's District Court bail hearing was held on June 2, 1998. The government immediately conceded that Defede was not a flight risk. The prosecutor initially believed, however, that Defede's detention was warranted because he posed a danger to the community. Midway during the hearing, the government ceased its dangerousness argument and represented that Defede's status was the sole relevant issue.

In support of its "dangerousness" recommendation, at the hearing's commencement the government expounded on the sources of its proffer:

A) Alfonse D'Arco ("D'Arco") would testify that he attended a 1989 ceremony in which Defede was inducted into the "family";

B) confidential sources, without personal knowledge (and not scheduled to testify at trial), claimed that Defede was elevated to acting boss in late 1993 or early 1994;

C) one confidential source, a Luchese member, heard from other members and associates that in late 1993 or early 1994 Defede was elevated to "acting boss" subsequent to Victor Amuso's incarceration;

D) Bureau of Prison records show that Defede visited Amuso on numerous occasions at the federal correctional facility in Terre Haute, Indiana;

E) tape recordings prove that Defede and Amuso discussed criminal activity and possible acts of violence;

F) Audio tapes illustrate that one Defede/Amuso conversation was "whispered"[2];

G) an informant alleged that Defede sought an apology from a disrespectful person who, if he failed to apologize, would have been harmed; and

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[2]The court became an unsworn witness against Defede, using its own knowledge to find facts.

H) Video surveillance tapes record that Defede left a building carrying a manilla envelope similar to one carried in by a co-defendant.

5. The Government's Concession

The government conceded that for bail purposes, the sole distinction between Defede and his co-defendants was his status. But for Defede's status, the government would not have sought his detention.

6. The Court's Decision

All government evidence relevant to dangerousness was converted by the District Court *sua sponte* to establish Defede's leadership. The Court inferred from the following five (5) evidentiary shreds that Defede was an organized crime leader:

Defede (i) made thirty-five (35) prison visits to Amuso; (ii) had "meetings" with known Luchese members; (iii) received a "yellow envelope" from Schlacter; (iv) was referred to by Schlacter when Schlacter mentioned "Joe" in a conversation; and (v) was involved in a "suspicious" recorded prison conversation with Amuso.

This evidence abjectly failed to provide concrete evidence that Defede possessed the unique characteristics inherent in being a leader of the Luchese organization.

POINT I

THE BOSS CLAIM LACKS MERIT

A. The Quality of the Evidence

The quality of the evidence hurled at Defede was extraordinarily poor. For evidence to be accepted by the trier of fact, it must satisfy a qualitative burden of reliability.

The District Court was clearly erroneous in its finding that the government presented clear and convincing

evidence of Defede's organized crime boss status. Many courts define 'clear and convincing evidence' as evidence which persuades a trier of fact that the truth of the matter is highly probable. This standard is more than a mere preponderance, but not as rigid as beyond a reasonable doubt. Some cases have even held that clear and convincing means a certainty.

B. The Nature of the Evidence

The court's conclusion that the proof established Defede as an organized crime leader is without foundation. It credited unsubstantiated multiple link hearsay, and drew unreasonable and unrealistic inferences from *de minimus* evidence which was incorrectly characterized by the court as "corroborative".

The District Court's analysis inadequately defined and failed to thoroughly consider the characteristics of such a person. We respectfully submit that the essential trademarks of an organized crime family's boss, like any boss, is that he/she has the ultimate decision-making authority and sole discretion regarding the methods by which he/she rules the organization. The proof accepted by the court failed to establish Defede's leadership because no government evidence confirmed that Defede possessed these leadership characteristics.

POINT II

THE BOSS EVIDENCE WAS FLAWED

A. The Confidential Informants' Hearsay Testimony

The court noted that the government proffer was unsupported by sworn testimony of anyone with personal

knowledge of Defede's position.[3] Defede Mem. Op. at 7. Although admissible in a bail proceeding, hearsay is inherently unreliable.[4]

Defede had no opportunity to cross examine any declarant. It is the deprivation of Defede's right to cross examine the declarant which justifies the hearsay rule. Wigmore, *Evidence,* Sections 1361, 1362.[5] Only hearsay substantiates Defede's purported status.

B. Prison Visits with Amuso

The Court erroneously relied upon Defede's visits with Amuso as "corroborative" evidence that Defede heads the Luchese family. Defede allegedly made thirty-five (35) visits to Terre Haute. Because Amuso was the Luchese boss, and because Defede is a purported member of the Luchese family, the court assumed that their conversations were about the commission of future crimes. No rational or reasonable inferences may be drawn regarding the content of the conversations. Indeed, audio surveillance of the conversations proved many of them inaudible. The court

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[3]Whether there was sworn testimony is unimportant. The point is that there was no witness who had personal knowledge to establish any of the government's proffers — most importantly, Defede's leadership.

[4]The rule against hearsay is perhaps the most important rule in the law of evidence. If a witness testifies to a fact of which he claims personal knowledge, he may be cross examined to determine the weight given to his testimony. The cross-examiner is given the opportunity to explore whatever weakness there may be in the witnesses' presentation.

[5]As to the issue of dangerousness, a person's disposition to do or not to do an act in issue is logically relevant to whether he has done the act. In a regular criminal prosecution a defendant may introduce reputation evidence as to his own good character for the purpose of making an inference that he would not be likely to commit the offense charged. The government may not prove the defendant's bad character unless the defendant introduces evidence of his good character.

arbitrarily, and without proof, created a conversation between Amuso and Defede which may never have existed. This type of analysis is clearly flawed.

C. The "Suspicious" Prison Conversation

To further substantiate Defede's status as acting boss, the court also erroneously relied upon an audio tape recording of a Defede/Amuso prison conversation where (according to the government) "breaking legs" and "picking up $50,000 from Anthony and others" were supposedly discussed. The government claimed that this proffer was material to Defede's dangerousness.

The court *sua sponte* utilized this prior proffer even though the tapes that purportedly reflected this conversation were inaudible. In actuality, there was no evidence on this issue before the court, and no inferences should have been drawn from the "content" of inaudible conversations. The court had no basis to deem the tape "suspicious" without having listened to it, and it had no reason to credit FBI tape transcriptions when it knew that the tape could not be deciphered.

D. The Yellow Envelope Episode

The court identified the "yellow envelope episode" as the third piece of "corroborative" evidence which established Defede's status. The government tried to establish a relationship among Defede, Schlacter and Vuolo. It claimed that Vuolo delivered an envelope to Schlacter which Defede later retrieved from Schlacter.

Based upon tape recordings, no discussion ensued regarding the envelope's contents. Schlacter did not mention that he was meeting Defede. Vuolo did not discuss the contents of the envelope. No proof was offered to establish that the envelope was the same, or that Defede and Vuolo actually met with Schlacter.

Assuming, *arguendo,* that Defede left the building with an envelope in hand, without evidence of its contents or from whom it was delivered, one may not reasonably infer any improper conduct. Yet the court unreasonably deduced that delivery and pick up of the envelope corroborated Defede's leadership position. The court's theory hardly substantiates that Defede is acting boss — it does establish (if at all) that he holds a less than boss status. The "yellow envelope episode" corroborates nothing.

E. Schlacter's Reference to Joe

The government alleged that the morning following the "yellow envelope episode", Schlacter referred to his supposed previous day's meeting with Defede in a taped conversation. During the conversation, Schlacter purportedly protested that someone said he had been cheating: "I said Joe, I'm here a long time." Schwartz interjected: "You're one of them." Schlacter responded, "If anyone thought I cheated them, I'd be dead." See Defede Mem. Op. at 6-7.

Nowhere in this conversation does Schlacter refer to a conversation he had with Defede. Schlacter nebulously refers to "Joe" with no last name. He did not delineate when he told the mysterious Joe that: "I'm here a long time." Likewise, Schlacter made no mention of the Luchese family, the mafia, mob or any individual who thought Schlacter was a "cheat".

In addition, Schlacter's statement does not necessarily imply that he believed he feared being murdered if he was cheating someone, or that he feared Luchese power. People commonly use "I'd be dead", or "he'll kill me" as a metaphor to show that an individual may have a problem with someone because of something the individual did. For example, a husband who has stayed out too late may remark to his friend: "I'm dead when I get home", or "My wife will

kill me because I'm so late." Schlacter's statement was more likely a metaphor than one of actual fear of murder.

There was also no evidence confirming Schlacter's relationship to Schwartz, or an explanation of why he would discuss Defede with him, if, assuming *arguendo,* Defede and Schlacter had actually met or even knew each other.

The extremely imprecise nature of the Schwartz/Schlacter exchange supports the more plausible inference that the two men were not speaking about Defede, and that Schlacter was not concerned about being killed by Defede or the Luchese family.

F. D'Arco's Lack of Personal Knowledge

The government maintained that D'Arco would testify that Defede was a "made" man. D'Arco, however, can have no personal knowledge regarding Defede's status. He was accepted into the Federal Witness Protection Program in 1991, making it impossible for him to acquire knowledge of Defede's conduct in subsequent years.

The District Court proclaimed that D'Arco is a credible witness because he testified reliably before the court in *United States v. Ida. See* Defede Mem. Op. at 10, fn 32. There D'Arco apparently had personal knowledge of various facts. Here, D'Arco's personal knowledge is limited to his purported observation that Defede became a member of the Luchese family.

POINT III

INCARCERATION BY STATUS VIOLATES THE FIFTH AND EIGHTH AMENDMENTS

The court detained Defede because of his status. The Eighth Amendment and *Robinson v. California,* 370 U.S. 660 (1962), prohibit punishment based on status as distinct from actions. The District Court held, in light of the

government's concession, that Defede's position in the Luchese hierarchy *sine qua non* mandates detention. The court found that Defede's alleged status, without considering evidence of prior dangerous and violent acts committed by him, was sufficient to establish his dangerousness. The court improperly incarcerated Defede.

The District Court reasoned that because no bail was granted to three organized crime leaders by the Second Circuit and District Courts, a rule of law had been established that these type people are not bailable. The Second Circuit, however, refused bail to each leader because of direct proof of actual violence for which it felt no conditions of release would deter possible future violence.

The government represented that Defede led the Luchese family since late 1993 or early 1994, yet it produced no evidence inculpating him during these years in any boss-like activity. Without evidence that Defede engaged in leadership transactions, the District Court based its determination of dangerousness only upon insufficient proof of status and nothing more.

The government is punishing Defede for his alleged leadership in organized crime, which is similar to the removal of *actus reus* as an element of criminal conduct. Defede plead not guilty and will hopefully obtain an acquittal because of his innocence — nevertheless, attaining a purported status has convinced the court to impose detention.[6]

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[6]All bail cases involving alleged heads of organized crime turn on direct proof of instances of violence (generally murder) and not status. *See United States v. Bellomo,* 944 F. Supp. 1160 (S.D.N.Y. 1996, Kaplan, J.), *United States v. Gotti,* 776 F.Supp. 666 (E.D.N.Y 1991), *United States v. Columbo,* 777 F.2d 96 (2d Cir. 1985), *United States v. Orena,* 986 F.2d 628 (2d Cir. 1993).

A. No Inferences May Be Drawn From Status

We respectfully submit that no inference may be drawn from Defede's status as suggested by the District Court. One accused of a crime is entitled to have his guilt or innocence determined solely on the basis of evidence, and not on grounds of official suspicion, indictment, continued custody or other circumstances. *See Estelle v. Williams,* 425 U.S. 501 (1976).

Taylor v. Kentucky, 436 U.S. 478 (1978) involved a prosecutor's argument to a jury that it should draw an adverse inference of guilt from the defendant's status as a defendant. The Court wrote, among other things, that this created a substantial danger that juries would convict upon extraneous considerations rather than the evidence. Here, the District Court's ruling was predicated on precisely the type of inferences which the Supreme Court cautioned against making.

The District Court believed that if one is the head of an organized crime family, he is therefore violent. Defede is allegedly such a leader, and thus, according to the court's analysis, by Socratic syllogism, he is therefore violent.

The court compared Defede to a baseball pitcher. It incorrectly reasoned that as one may infer that a pitcher will throw a ball during a baseball game, one may likewise infer that an organized crime boss will directly or indirectly engage in violence.[7] The baseball pitcher analogy defies logic. A pitcher's essential function is to throw a baseball. It is rational to infer that a pitcher will throw a ball because this is his essential function.

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[7]On many occasions, the District Court used the word "undisputed." All material facts were disputed by Defede. Defede plead not guilty to the charges registered against him, which constituted the identical claims made against him by the government at the bail hearing. He was not required to deny the material grand jury charges under oath.

A boss, however, has many functions. Not every function is essential. For example, while a boss may personally hire underlings, it may not be inferred that because he is a boss he must hire underlings. A boss has the freedom and discretion to choose the methods by which he leads. Each boss supervises in his/her own manner. In Defede's case, even if there is clear and convincing evidence that he is acting head of the Luchese family, no reasonable inference may be drawn regarding his dangerousness. Violence is a non-essential function of being an organized crime boss. Since there is a host of actual evidence that Defede is not dangerous, the more likely inference is that Defede eschews violent conduct.

POINT IV

THE DISTRICT COURT CREATED AN IRREBUTTABLE PRESUMPTION

The District Court held that the government need only prove by clear and convincing evidence that Defede was the head of a crime family to warrant his pre-trial detention. The government conceded that insufficient evidence existed to detain Defede absent proof of his status[8].

By the court's analysis, once such a determination is rendered, no evidence can possibly overcome the dangerousness inherent in a person's status as an organized crime family boss. The court created an irrebuttable (conclusive) presumption — an inference which, as a matter of law, cannot be rebutted. This irrebuttable presumption is actually a rule of substantive law expressed in terms of rules of evidence. This "Mafia crime boss"

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[8]The Court noted that Defede had no prior record and had well established community ties. *See Defede Mem. Op. at 13.*

conclusive presumption of dangerousness violates Defede's substantive and procedural due process rights.

In *Hunt v. Roth,* 648 F.2d 1148 (8th Cir. 1981), *vacated as moot* sub nom. *Murphy v. Hunt,* 455 U.S. 478 (1982) (per curiam), the court struck as unconstitutional an almost identical irrebuttable presumption. The Nebraska constitution withheld pretrial release to persons charged with various crimes. *Hunt* held that such a presumption violated the Eighth Amendment. Had a due process (or equal protection) analysis been utilized, the Court's reasoning would still be relevant:

> . . . The fatal flaw in the Nebraska constitutional amendment is that the state has created an irrebuttable presumption that every individual charged with this particular offense is incapable of assuring his appearance by conditioning it upon reasonable bail or is too dangerous to be granted release. . . . The state may be free to consider the nature of the charge and the degree of proof in granting or denying bail but it cannot give these factors conclusive force. *Hunt,* 648 F.2d at 1164.

Even if Defede were a perfect citizen, the District Court would not permit him to overcome the irrebuttable presumption created by the assumption that he is acting boss.

POINT V

THE COURT FAILED TO EXAMINE THE PROPRIETY OF IMPOSING BAIL CONDITIONS

Lease Restrictive Credo

Both the current and prior bail statutes favor pre-trial release. The current act provides that even if a bail

candidate is found to be dangerous, the court is still obligated to inquire whether release conditions will prevent violent conduct. Neither the Magistrate nor the District Court examined any of the nineteen (19) conditions found in the statute.

The 1966 Bail Reform Act created a presumption in favor of releasing defendants on their own recognizance; it provided that release conditions could be imposed only if the magistrate determined that they were necessary to reasonably assure the appearance of the accused. When conditions were deemed necessary, the law required the magistrate to apply the least restrictive condition or combination of conditions. Non-financial conditions were preferable to bail.

The 1984 Bail Reform Act ("Act") differs from the prior act in two material ways. First, it authorizes the magistrate to set conditions for release and to consider the extent to which release will endanger the safety of any other person or the community. 18 U.S.C § 3142(b). Second, under certain circumstances, the magistrate may order pre-trial detention.

Notwithstanding its detention provision, the current act, as did the old one, follows a "no or least restrictive condition" credo. The magistrate is required to release a defendant unless he concludes that more restrictive conditions are necessary to reasonably assure that a defendant will not flee or endanger others while free.

The statute also provides that the magistrate may not impose a financial condition which results in pre-trial detention. 18 U.S.C. § 3142(c)(2). The intention of Congress is clear — to prohibit the use of bail as a form of *sub rosa* preventive detention. If a judge believes that an accused must be detained prior to trial, he must follow the detention provisions set forth in the statute.

The Act permits detention of defendants in certain circumstances if, "after a hearing, no condition or combination of conditions will reasonably assure . . . . the safety of any other person and the community . . . ." 18 U.S.C. § 3142(e).

To properly determine whether a condition will reasonably assure the safety of others, the magistrate must analyze (i) the nature of the offense, (ii) the weight of the evidence against the defendant, (iii) the history and characteristics of the defendant, including his physical and mental condition, his ties to family and community, and (iv) whether at arrest he was on probation, parole, or pre-trial release from another offense. The facts used by the magistrate to support a determination that no condition[s] will reasonably assure the safety of any person and the community must be supported by clear and convincing evidence. 18 U.S.C. § 3142(f). The Act also creates two rebuttable presumptions which are inapplicable to Defede.

Imposition of a combination of statutory conditions would certainly prevent Defede from violating bail. Indeed, the court's determination that no conditions would assure the public's safety was made without precedent or factual basis. We know of no instances in which organized crime leaders have violated bail conditions. Likewise, other purported organized crime leaders were detained prior to trial and had no opportunity to breach bail conditions. Since no conditions have ever been imposed upon organized crime leaders, the court had no reason to believe that Defede would breach bail conditions and engage or sanction violence assuming *arguendo* that he is the Luchese family leader.

POINT VI

GOVERNMENT PROFFERS AGAINST OTHER CRIME LEADERS CONTAIN SIGNIFICANTLY STRONG EVIDENCE

In each case in which an organized crime boss was detained, the government's proffer always incorporated direct knowledge from a witness to whom he had given orders and direct proof of status and violence. In some instances the boss had actually given orders to commit crimes, and direct proof existed that the boss had engaged in violence.

In *United States v. Bellomo,* 944 F. Supp. 1160 (S.D.N.Y. 1996, Kaplan, J.), for example, the government presented potential witness testimony detailing Bellomo's role in directing, approving and sanctioning a murder.

The government had extensive probative evidence of Bellomo's extortion and labor racketeering conduct, and reported that another witness would testify about Bellomo's crimes. Documents existed which inculpated Bellomo and court authorized interceptions established that Bellomo enabled his crime family to receive unlawful labor payments.

In *United States v. Salerno,* 481 U.S. 739 (1987), *United States v. Columbo,* 777 F.2d 96, (2d Cir. 1985) and *United States v. Orena,* 986 F.2d 628 (2d Cir. 1993), the government proffered reliable direct evidence of each leader's role in directing his organization and the leader's actual participation in criminal activity. The witnesses personally observed acts purportedly committed by these defendants.

Here, the government had no such evidence against Defede. The government could only muster triple link hearsay allegations from FBI affidavits. Unreliable hearsay

is insufficient to overcome Defede's denial of leadership or satisfy the clear and convincing standard.

While the use of hearsay in a detention hearing is proper, *United States v. Acevedo-Ramos,* 755 F.2d 203 (1st Cir. 1985) stressed the power of the court to test the hearsay's reliability. Here, the court deemed the hearsay reliable without inquiry.

In addition, the court's reference to the government's outline of the case as a "proffer" is misplaced. The prosecutor at the outset merely summarized the charges relating to Defede. *See* Mem. Op. at 2.

The court's suggestion that Defede should deny these allegations under oath was surprising. The government "proffered" the identical facts contained in the indictment. Had Defede testified he would have waived his fifth amendment privilege and would thus have been available as a witness for the government on its direct case! A fifth amendment waiver is not required to assert an eighth amendment right. Defede did not dispute the facts through counsel. *See* Mem. Op. at 9. Defede plead not guilty to the indictment. He was not required to swear to anything — his plea placed all facts in issue.

The court also made its own findings against Defede. It found that because Defede's automobile was seen at a diner with those of other supposed crime figures, that this proved that a meeting "common" to those persons had taken place. With no proof except for parked vehicles the court became an unsworn witness to this factual finding.

In the same vein, because witness D'Arco was credible in another case, the court ruled that he would be credible in Defede's case — mere inappropriate conjecture.

POINT VII

LIVE TESTIMONY IS REQUIRED TO PROVE DEFEDE'S DANGEROUSNESS

Defede vehemently disputed that he is the leader of the Luchese family. The government's charge is predicated upon multiple link hearsay contained in FBI affidavits, and a statement from a "made member" of the Luchese family that someone told him that Defede was in control of the Luchese family. Defede challenged the quality of these proffers.

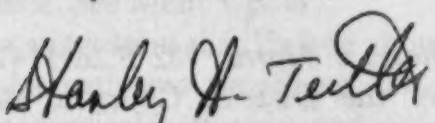
United States v. Martir, 782 F.2d 1141, 1147 (2d Cir. 1986), allows the District Court to demand further government elaboration when its proffer is challenged. *Martir* encourages courts to consider the high stakes involved when scrutinizing a proffer's reliability. The lower court ignored the importance of soliciting better evidence. Here, only one witness would have been required to prove Defede's status — hardly a situation which would have triggered a plenary trial as the court anticipated would occur.

CONCLUSION

The Court's detention order should be reversed.

July 6, 1998
New York, New York

Respectfully Submitted,
Stanley A. Teitler, P.C.



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APPENDICES

APPENDIX A

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JUNE 8, 1998

United States District Court

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

JOSEPH DEFEDE, ET AL.,
Defendants.

98 Crim. 373 (LAK)

MEMORANDUM OPINION

Appearances:

Joseph Bianco
Assistant United States Attorney
MARY JO WHITE
UNITED STATES ATTORNEY

Stanley A. Teitler, LLP
Attorney for Defendant Joseph Defede

LEWIS A. KAPLAN, *District Judge.*

The indictment in this case charges that Joseph Defede is a made member and, since late 1993 or early 1994, the

acting boss of the Luchese organized crime family. Defede is charged with conspiring to conduct the affairs of the Luchese family, an alleged RICO enterprise, through a pattern of racketeering activity, with conspiracy to extort money and property from businesses in New York's garment center, and with five substantive extortion counts. Defede now seeks review, pursuant to 18 U.S.C. §3145, of Magistrate Judge Peck's order that he be detained pending trial on the basis of Judge Peck's determinations that the defendant is charged with a crime of violence and, by clear and convincing evidence, that no condition or combination of conditions will reasonably assure the safety of other persons and of the community. Although Defede characterizes his application as an appeal, the Court treats the application as a motion to revoke or amend the order pursuant to 18 U.S.C. §3145(b). In considering the application, the Court determines the matter *de novo*.[1]

The government's proffer before Judge Peck, which was clarified and expanded somewhat before the undersigned, in broadest outlines is as follows: The Luchese family is an organized crime family engaged in a large variety of illegal activities including, significantly for purposes of this case, long standing extortion from persons and entities doing business in the garment center. The family is headed by a "boss," who supervises its criminal activities and receives a cut of the illegal proceeds of his subordinates. The boss thus oversees and shares in the proceeds of the alleged extortion of garment center firms. During the period relevant to this application, the Luchese boss was Vic Amuso, who for some time has been serving a lengthy sentence in federal custody. In late 1993 or early 1994, Defede, a member of the family, allegedly was made the

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[1] *United States v. Leon*, 766 F.2d 77, 80 (2d Cir. 1985).

"acting" or "street" boss and began reporting to and receiving instructions from Amuso in frequent prison visits.

It is undisputed that the defendant is charged with a crime of violence and is subject to pretrial detention on an appropriate showing[2]. The government conceded before Judge Peck that Defede poses no flight risk. The only disputed question is whether the government established by clear and convincing evidence "that no condition or combination of conditions will reasonably assure the ...safety of any other person and the community . . . ."[3]

There is ample basis for concluding that no condition or combination of conditions would adequately assure the public safety if Defede in fact is the acting head of the Luchese family, as the government's proffer as to the role of the head of the family and as to the family's activities is uncontroverted. Both the Second Circuit and this Court have detailed the risk that the continued liberty of such a person poses and the adequacy of that risk as a basis for pretrial detention.[4] The pivotal issue therefore is whether

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[2]18 U.S.C. § 3142(f)(1)(A).

[3]*Id.* §§ 3142(e), 3142(f).

[4]*E.g., United States v. Orena,* 986 F.2d 628, 632 (2d Cir. 1993): *United States v. Gotti,* 98 Crim. 42 (BDP) (S.D.N.Y. Feb 13, 1998) (bench opinion); *United States v. Bellomo,* 944 F. Supp. 1160, 1167 (S.D.N.Y. 1996); *see also United States v. Salerno,* 471 U.S. 739, 744 (1987); *United States v. Colombo;* 777 F. 2d 96, 100-01 (2d Cir. 1985).

Contrary to Defede's argument, the government's detention argument in this case is not based on defendant's alleged status in violation of *Robinson v. California,* 370 U.S. 660 (1962). *Robinson* holds that the Eighth Amendment prohibits punishment based purely on status as distinct from actions. *Id.* At 667. Here, on the other hand, it is well established that persons who hold Defede's status routinely engage in conduct that is a menace to public safety. The argument thus is based not on the status, but on the inference that a person in Defede's

there is sufficient basis for the Court to find that Defede is the acting boss to justify the necessary conclusion as to danger to public safety, an issue rendered all the more important by the government's concession that there is insufficient basis for pretrial detention of Defede unless it has shown by clear and convincing evidence that he is the acting boss of the Luchese family.[5]

The Sufficiency of the Government's Showing

Defede's counsel denies that Defede is the acting boss of the Luchese family, although Defede presented no sworn proof. The government's proffer as to Defede's position as acting boss includes principally these elements:

First, it has indicated that Alphonse D'Arco, a former acting boss of the Luchese family who began cooperating with the government in or about 1991 and who testified for the government in *Bellomo* among other cases, will testify that he was present when Defede became a made member of the Luchese family upon the sponsorship of Vic Amuso.[6] D'Arco will testify further that, as acting boss of the Luchese family, he was in charge of all its criminal activities, including extortion of the garment center, the construction

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position is quite likely to engage in dangerous conduct - just as one reasonably could infer that one holding the position of major league baseball pitcher is entirely likely to hurl a small white object in the direction of home plate.

[5]Tr., June 2, 1998, at 47-48.

[6]*E.g.*, McNair Aff. 6/2/95 ¶ 22; Tr. 6/2/98 at 33-34.

D'Arco evidently will testify also to the overall criminal operations of the Luchese family including its extortion of garment center businesses in the period prior to D'Arco's agreement to cooperate with the government. DiGregorio 12/17/93 Aff. ¶ 21.

industry, the garbage industry, gambling, loansharking and Kennedy airport, and that Defede was engaged in gambling and loansharking during D'Arco's tenure.[7]

Second, a number of as yet unidentified confidential sources, including at least one made member of the Luchese family, are said to have identified Defede as the acting boss or as holding a comparable leadership position during the relevant period.[8] At least one confidential source is said to have informed the FBI that Defede effectively served as the go-between, reporting to and receiving advice or instructions from Vic Amuso since the latter has been incarcerated.[9] Bureau of Prisons records confirm that Defede was a frequent visitor to Amuso. Amuso and Defede made efforts to avoid having their conversations during Defede's visits overheard.[10] Nevertheless the government on one occasion succeeded in obtaining a poor quality recording which appears to support the view that Amuso and Defede discussed Luchese family criminal business.[11]

Third, there is circumstantial evidence linking Defede to collection of extortion payments from garment center businesses on a specific occasion in July 1996. The government's proffer, undisputed in this respect, established that it was a routine practice for extortion payments to be delivered to defendant Schlacter who in turn handed the money over to a representative of the Luchese

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[7]Tr. 6/2/98 at 34.

[8]E.g. DiGregorio 12/17/93 Aff. ¶ 26; McNair 6/2/95 Aff. ¶¶ 26-27; McNair 7/14/95 Aff. ¶20.

[9]DiGregoria 12/17/93 Aff. ¶ 28.

[10]DiGregorio 1/14/94 Aff. ¶ 17.

[11]*Id.*, ¶ 23; McNair 6/2/95 Aff. ¶ 46.

boss. On July 25, 1996, a man named Vuolo, who on another occasion was present while Schlacter was seen counting money on his desk,[12] met with Schlacter in his office. The sound of crinkling paper was heard. Vuolo then remarked, "Skinny, huh!" He then was observed closing a large envelope approximately 11 by 14 inches and said to Schlacter, "A quarter to two, I'll be in the back." Schlacter responded, "Fourth floor." Vuolo replied, "Yeah."[13]

Agents later observed Vuolo enter 1400 Broadway carrying a large yellow envelope similar to the envelope he closed in Schlacter's office.[14] Shortly thereafter, Schlacter left his office, walked to 1400 Broadway, entered the building, and was observed on the fourth and later the tenth floors.[15] Twenty seven minutes after Schlacter arrived, Defede entered 1400 Broadway and appeared to walk toward the same tenth floor premises to which Schlacter had gone.[16] Eight minutes later, Vuolo was observed in the building lobby without the yellow envelope.[17] A short time later, Defede exited 1400 Broadway with a large thick yellow envelope.[18] Schlacter left moments later.[19]

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[12]Giacolone Aff. ¶ 67.

[13]Giacolone Aff. ¶ 53.

[14]*Id.* ¶ 54.

[15]*Id.* ¶¶ 55-56.

[16]*Id.* ¶ 57.

[17]*Id.* ¶ 58.

[18]*Id.* ¶ 59.

[19]*Id.*

On the following morning, Schlacter was overheard to a man named Schwartz. During the conversation, Schlacter protested that someone had said that he had been cheating. Schlacter continued, "I said Joe, I'm here a long time." Schwartz interjected, "You're one of them." Schlacter responded, "If anybody thought I cheated them before I'd be dead."[20]

Fourth, there is considerable evidence that law enforcement officers observed Defede meeting with various members and associates of the Luchese family in a manner common for leadership figures in organized crime.

Defede's position is simple. The statute, he argues, requires proof of danger by clear and convincing evidence. Proof of Defede's alleged position in the Luchese hierarchy, in light of the government's concession, is a *sine qua non* for a detention order. The government's proffer, which is unsupported by sworn testimony of anyone with personal knowledge of Defede's position, is met by Defede's unsworn and unsubstantiated denial. In this posture, says Defede, the detention order must fall for want of clear and convincing proof. The matter, however, is not as simple as Defede would have it.

The Bail Reform Act requires a hearing prior to the entry of a detention order[21]. It is considerably less explicit about the precise nature of the hearing, saying in relevant part only that the defendant "shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise" and that the rules of evidence do not apply.[22] Nevertheless, it now is clear in this

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[20] *Id.* ¶¶ 65-66.

[21] 18 U.S.C. § 3142(f).

[22] *Id.*

Circuit that the government as well as the defendant "may proceed by proffer.",[23] which is implicit in the fact that the rules of evidence are inapplicable. "[T]he thrust of the legislation is to encourage informal methods of proof. Congress did not want detention hearings to resemble mini-trials...."[24]

The fact that the Bail Reform Act does not require an evidentiary hearing prior to the issuance of any detention order of course does not mean that a court is free to detain a defendant by arbitrarily crediting an unpersuasive government proffer over an unsubstantiated proffer of denial by the defendant. The stakes in pretrial detention are too high. Here, for example, it is likely that Defede, if detained pending trial, will be deprived of his liberty for perhaps as long as ten months before a verdict can be reached.[25] But the government does not here seek detention on so thin a basis.

In this case, the government has made a detailed proffer, large elements of which are undisputed by the defendant and other portions of which are disputed only to the extent that he questions generally the credibility of government informants or challenges the inferences to be drawn from otherwise undisputed facts such as Defede's numerous jail house visits to Amuso and the significance of his emergence from 1400 Broadway with the yellow envelope. In fact,

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[23]*United States v. Ferranti*, 66 F.3d 540, 542 (2d Cir. 1995); *see United States v. Martir*, 782 F.2d 1141, 1144-45 (2d Cir. 1986) (government may proceed by proffer as to risk of flight).

[24]*Martir*, 782 F.2d at 1145.

[25]The trial is scheduled to commence on January 5, 1999. Counsel have estimated that it will last three months. The Court would be prepared to entertain an application by the defendants to advance the trial date.

insofar as is relevant to the aspects of the government's proffer summarized above, Defede explicitly denies only that he is the acting boss of the Luchese family - and he does that only through an unsworn statement of counsel. In these circumstances - that is, where there is no specific denial under oath of the critical elements of the government's proffer - it seems to this Court that the Bail Reform Act permits the Court to assess the persuasiveness of the parties' proffers and make the necessary determination under the Act[26].

This conclusion is supported by the cases. In *United States v. Smith,*[27] the District of Columbia Circuit, for example, upheld a detention order based on a finding of dangerousness rooted in the government's proffer despite the fact that the defendant took the witness stand and denied having committed the acts charged.[28]

This view finds support also in the fact that a criminal defendant is not entitled to an evidentiary hearing on a motion to suppress evidence absent the submission of an affidavit based on personal knowledge setting forth facts

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[26]*Cf., e.g., Holt v. Continental Group, Inc.*, 708 F.2d 87, 90n.2 (2d Cir. 1983) (party resisting preliminary injunction that "elects to gamble on a 'battle of affidavits' must live by that choice"); *Consolidated Gold Fields. PLC v. Minorco SA*, 871 F.2d 252, 256, *amended on other grounds,* 890 F.2d 569 (2d Cir.), *cert. Dismissed*, 492 U.S. 939 (1989) (same).

[27]79 F.3d 1208 (D.C. Cir. 1996).

[28]*Id.* at 1210-11. See also *United States v. Salerno,* 481 U.S. at 743 (detention based on government proffer upheld despite defendant's challenge to credibility of proffered trial witnesses); *United States v. Gaviria,* 828 F.2d 667, 669 (11th Cir. 1987) (upholding ruling precluding defendant from calling case agent to testify at bail hearing and affirming lower court's discretion to allow government to proceed by proffer).

necessary to make out a *prima facie* case that the evidence was obtained in violation of the defendant's rights.[29] Surely the defendant's interest in suppression of the evidence in such a case may be every bit as great as that of a defendant faced with a pretrial detention application, as the outcome of the prosecution — and thus the defendant's liberty — may turn on the determination of the suppression issue. Yet the Court is unaware of any basis for concluding that a defendant may compel an evidentiary hearing simply by claiming, in an unsworn statement by counsel, that evidence was obtained illegally.

Nor is there much reason to believe that an evidentiary hearing would add materially to the information before the Court. The government has indicated that it would offer testimony by the agents whose affidavits already are before the Court in order to confirm through their hearsay testimony the statements allegedly made by the various cooperators and confidential sources.[30] Defede's counsel was non-committal as to whether Defede would testify if a testimonial hearing were held.[31] Thus, if the government's proffer is sufficiently persuasive to overcome Defede's narrow, unsworn, and conclusory denial, there is no reason to hold a hearing.

The evaluation of the relative strength of the proffers in this case does not require extensive analysis. The government's evidence that Defede is the acting boss of the Luchese family comes from several different confidential

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[29]E.g., *United States v. Gillette,* 383 F.2d 843, 848 (2d Cir. 1967); United States v. Ahmad, 992 F. Supp. 682, 685 (S.D.N.Y. 1998); *United States v. Bellomo,* 954 F. Supp. 630, 639 (S.D.N.Y. 1997); *United States v. Montoya-Escheverria,* 892 F. Supp. 104, 106 (S.D.N.Y. 1995).

[30]Tr. 6/2/98 at 51.

[31]*Id.* at 54.

sources, at least one of them a made member of the family who reasonably may be expected to have personal knowledge of Defede's status. The fact that Defede occupies such a position is corroborated at least by (1) his frequent visits to Amuso, which are far more likely to have been for the purpose ascribed by the government than for any other, (2) the highly suspicious nature of the one recorded prison conversation between the two, (3) the yellow envelope episode which is so suggestive of Defede having picked up the periodic garment center extortion payments long made to the Luchese boss or his representative, (4) Schlacter's recorded reference to his conversation with "Joe," one day after surveillance placed Schlacter, point man for the garment center extortion operation, and Defede at 1400 Broadway at the same time, concerning whether Schlacter was cheating someone and Schlacter's belief that he would have been killed had he been doing so, and (5) the surveillance evidence establishing Defede's frequent meetings with family members and associates in the manner now familiar to many federal judges who have presided over alleged Mafia trials. The fact that the head of the Luchese family is responsible for extensive criminal activity, which is not disputed by Defede, in any case is extensively corroborated by the government's proffer, including the proffered testimony of former Luchese boss D'Arco.[32]

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[32]Although it is not necessary to the Court's determination of this motion. D'Arco's record suggests that he is quite reliable. D'Arco testified extensively before the undersigned in *United States v. Ida*, S1 96 Crim. 430 (LAK), last year. His testimony was virtually the only evidence against Ida on the charge that Ida conspired to murder Ralph DeSimone and the principal evidence that he conspired to murder Hickey DiLorenzo. The jury convicted Ida of both charges and could not have done so unless it believed D'Arco's testimony. *See generally id.* Tr. 7/25/97 at 24-28 (denying Ida motion for judgment of acquittal on these counts).

Against all this stands only the conclusory denial by Defede's counsel that Defede is acting boss, a denial that does not even address the corroborative evidence. On this record, the Court finds by clear and convincing evidence that Defede is the acting boss of the Luchese family. The acting boss of the Luchese family supervises all of its far-flung criminal activities, including acts of violence. Defede's continued liberty therefore presents a substantial danger to the public unless some condition or combination of conditions can provide adequate protection.

Inadequacy of conditions

In considering the adequacy of conditions to safeguard the public, it is important to recognize that the threat inherent in Defede's continued liberty need not stem directly from the threat of violent acts by him.[33] Nor need it arise from the charged offenses.[34] Given Defede's position of leadership in a notorious and violent criminal organization, "his ability to plan, order, and supervise criminal activity"[35] is of paramount importance. Defede "is a danger at least as much for what he might direct or assist others in doing as for what he might do himself."[36] In consequence, for the reasons set forth in *Bellomo,*[37] both

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[33]*See, e.g., Ferranti,* 66 F.3d at 543 (citing *Colombo,* 777 F.2d at 98).

[34]*See, e.g., United States v. Rodriguez,* 950 F.2d 85, 88 (2d Cir. 1991); *Bellomo,* 944 F.Supp. at 1166.

[35]*Bellomo,* 944 F. Supp. At 1167.

[36]*Id.*

[37]*Id.*

Gotti cases,[38] and in the Court of Appeals decisions in *Colombo*[39] and *Orena,*[40] this Court finds, by clear and convincing evidence, that no condition or combination of conditions adequately would secure the safety of the community.

Conclusion

While certain of the factors set forth in 18U.S.C. §3142(g) favor the defendant,[41] the government's proof as to his danger to the community is convincing for the reasons shown above. Contrary to the defendant's assertions, it appears to the Court that the government has a strong case against him. The offense, extortion, is a crime of violence both because it is so defined by statute and because its completion often involves the threat of physical harm. For all of the foregoing reasons, Defede's appeal, which is treated as a motion to revoke or amend Magistrate Judge Peck's detention order, is denied. The order will remain in place.

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[38]*United States v. Gotti,* 98 Crim. 42 (BDP) (S.D.N.Y. Feb. 13, 1998) (Bench opinion); *United States v. Gotti,* 776 F. Supp. 666, 672-73 (E.D.N.Y. 1991).

[39]777 F.2d at 99-100.

[40]986 F.2d at 632.

[41]Defede, for example, has no prior record and has well established ties to the community.

SO ORDERED.

Dated: June 8, 1998

/Signature/
Lewis A. Kaplan
United States District Judge

APPENDIX B

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JUNE 25, 1998

COPY / MANDATE

United States Court of Appeals

FOR THE SECOND CIRCUIT

/Stamp/
UNITED STATES COURT OF APPEALS
FILED June 17 1998
GEORGE LANGE III CLERK
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

against

JOSEPH DEFEDE,

Defendant.

SDNY-NYNY
98-CR-373
KAPLAN

98-1319
Each motion must be accompanied by
a supporting affidavit.
(Local Rule 27(a)
98 CR 373/Docket Number

NOTICE OF MOTION
for reversal of detention order (Kaplan, J.)

MOTION BY:
Stanley A. Teitler, P.C.
299 Broadway, New York, New York 10007
Stanley A. Teitler
212-233-8031

Has consent of opposing counsel:		
A. been sought?	(Check marked)	Yes
B. been obtained?	(Check marked)	No
Has service been effected?	(Check marked) (neither yes or no)	
Is oral argument desired? *(Substantive motions only)*	(Check marked)	Yes
Has argument date of appeal been set:		
A. by scheduling order?	(Check marked)	No
B. by firm date/argument notice?	(Check marked)	No
C. If yes, enter date:	N/A	

OPPOSING COUNSEL:
U. S. Attorney - SDNY
One St. Anthony Plaza
New York, New York 10007
Joseph Bianco

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? *(See F.R.A.P. Rule 8.)*	(Check marked	No
Would expedited appeal eliminate need for this motion?	(Check marked)	No

Will the parties agree to maintain the status quo
until the motion is heard? (Check marked) Yes

Judge or agency whose order is being appealed:
Kaplan, J. (SDNY)

/signature/
By: *(Signature of Attorney)*
Signed name must by printed beneath
/Stanley A. Teitler/
Date: June 12, 1998

Appearing for: (Name of Party) Joseph Bianco, AVSA
Appellant or Petitioner: (Check marked) Defendant
Appellee or Respondent: (Check marked) Plaintiff

ORDER

Hon. Ellsworth A. Van Graafeiland, Hon. Amalya L. Kearse, Hon. Dennis Jacobs, C.JJ.

IT IS HEREBY ORDERED that the motion to file an oversized memorandum of law is granted.

The motion for reversal of the detention order and bail pending appeal is DENIED.

Date: 6/25/98

/Stamp/
UNITED STATES COURT OF APPEALS
FILED
JUNE 25 1998
GEORGE LANGE III, CLERK
SECOND CIRCUIT

FOR THE COURT:
GEORGE LANGE III, Clerk
by: /Signature/
Beth J. Meador, Administrative Attorney